90-1495

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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**GEORGE CAMERON,**
**ELRADER BROWNING, JR.,**
**GREGORY WASHINGTON,**
**JAMES HOLIDAY,**

**Petitioners,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Whether *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985), requires suppression of wiretap evidence where the facts show intentional or reckless omissions or misrepresentations in the wiretap application?

## PARTIES TO THIS PROCEEDING

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## INTRODUCTORY STATEMENT

The United States Court of Appeals for the Ninth Circuit rendered a decision in an unpublished Memorandum on August 6, 1990, in which that court ignored established precedent and denied Petitioners the benefit of applicable law in this Circuit. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc* which was denied by the Court of Appeals on January 16, 1991. Petitioners Cameron, Browning,

Washington, and Holdiay therefore request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in *United States v. Cameron, et al.*, Nos. 88–5305, 88–5322, 88–5288, and 88–5321.

## OPINION OF THE COURT BELOW

On August 6, 1990, the Court of Appeals for the Ninth Circuit affirmed the district court's denial of Petitioners' Motion to Suppress Wiretap Evidence in a Memorandum not appropriate for publication (attached as Appendix "A"). Petitioners subsequent Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by the Ninth Circuit on January 16, 1991 (attached as Appendix "B").

## STATEMENT OF JURISDICTION

On January 16, 1991, the Court of Appeals entered judgment denying Petitioners' Petition for Rehearing and rejecting Petitioners' Suggestion for Rehearing *en banc*. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

This petition is timely because, as required by Supreme Court Rules 13.1 and 13.4, 90 days have not yet elapsed since the denial of Petitioners' timely filed petition for rehearing to the Ninth Circuit Court of Appeals.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 U.S.C. § 2518 provides, in pertinent part:

**§ 2518. Procedure for interception of wire, oral, or electronic communication**

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction both within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

## STATEMENT OF THE CASE

State and Federal law enforcement officials began an investigation into the operations of a suspected cocaine and heroin distribution ring in Southern California. Over time, the agencies focused on the activities of the Browning/McFadden organization. Based on their suspicions, law enforcement officials began the process of gathering information on the activities of suspected members of the organization in hopes of obtaining sufficient evidence to justify prosecution. Eventually, the decision was made to abandon traditional means of investigation in favor of surreptitious electronic surveillance.

On March 12, 1987, an application for a wiretap was presented for judicial review. In support of the allegations contained within the application was a seventy page affidavit sworn out by Special Agent Ruddy J. Bareng of the Drug Enforcement Administration. The application was approved and the agents established interceptions on telephone lines subscribed by Nei Wells and Mary Callum—both suspected distributors of controlled substances for the organization.

The evidence gathered through the use of the wiretaps led to the indictment of Petitioners on charges alleging numerous violations of the laws of the United States. Prior to trial, Petitioners separately filed and litigated Motions to Suppress evidence gathered by use of wiretaps. All parties extensively briefed the issue and the district court granted a *Franks* hearing regarding the information contained in the affidavit filed in support of the wiretap application.

The district court denied the Motion to Suppress, and numerous excerpts of the tape recorded conversations were introduced at trial.

The tapes, coupled with the trial testimony of an admitted accomplice—Nei Wells—led to the conviction of Petitioners on all counts.

On appeal to the Ninth Circuit, after Petitioners had filed individual opening briefs, the Court consolidated the appeals. Hence, Petitioners filed a consolidated reply brief. The Court of Appeals affirmed the district court's denial of Petitioners' Motion to Suppress, and subsequently, denied Petitioners' Motion for Rehearing and Suggestion for Rehearing *en banc*.

## REASONS FOR ALLOWING THIS WRIT

In its unpublished Memorandum decision of August 6, 1990, in which the panel sitting for the Ninth Circuit determined that the government had shown the sufficient necessity required in order to obtain a wiretap to aid in the government's investigation, the panel did not cite, reference, or address the seminal decision *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985).

*United States v. Ippolito* is controlling authority in the Ninth Circuit. Yet, even though *Ippolito* applied to the facts in petitioners' case, and even though the holding and rationale of *Ippolito* required the suppression of wiretap evidence due to a lack of probable cause and necessity—not to mention false and misleading statements and omissions by the affiant—the Court of Appeals failed to consider or rule in accordance with the established and well-reasoned precedent established in *United States v. Ippolito*.

The two issues raised by Petitioners relevant to this petition for a writ of certiarori are (1) whether the government showed the requisite amount of necessity in order to justify the issuing of a wiretap to aid in the government's investigation, and (2) whether the government showed sufficient good

faith to use normal alternative means of investigation before requesting a wiretap.

As expressed by the panel sitting for the Ninth Circuit:

> [F]irst, whether the judge who issued the warrant authorizing the wiretaps properly determined that the wiretap was necessary for the government's investigation; and second, whether the trial judge properly determined that there were no intentional or reckless omissions or representations in the wiretap application. (*See* Appendix A at 2).

Addressing necessity, the Memorandum discloses that the trial court "acted well within its discretion in finding this condition satisfied." (Memorandum at 3). Concerning the material omissions and misrepresentations, the Memorandum, while addressing the district court's obligatory duty to examine whether the application for the wiretap warrant contained any intentional or reckless omissions or misrepresentations, noted:

> In light of the evidence that both prosecution and defense presented the district court on this issue, we conclude that the court did not clearly err in finding no such infirmity. (*See* Appendix A at 6)

Petitioners petition this Court because the conclusions reached in the Memorandum—as well as the rationale necessarily employed by the Court of Appeals in denying Petitioners petition for rehearing—conflict with the holding and supporting rationale in *United States v. Ippolito*. In *Ippolito*, the Ninth Circuit Court of Appeals was called upon to decide the propriety of a trial court's reliance on *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978), in holding that false and misleading information in a government affidavit

required suppression of the information derived from the wiretaps. *United States v. Ippolito*, 774 F.2d at 1483. The panel in *Ippolito* noted:

> The district court found that although the government had tried some alternative methods of investigation, it had mislead the issuing judge about the willingness of a particular informant to testify and about his ability to uncover evidence of a conspiracy using only conventional techniques. Therefore, it is necessary to evaluate the hypothetical effect of the knowledge of the existence of a potentially useful informant on the original district court's determination that a wiretap was necessary. If it would have no effect, then the misstatement would not be material. *United States v. Ippolito*, 774 F.2d at 1485–86.

Factual support for a key premise in *Ippolito* was that an informant was willing to testify and an informant was willing to demonstrate his ability to uncover evidence of the conspiracy using only conventional techniques. The court in *Ippolito*—using a hypothetical analysis as indicated in the quoted passage—did not limit the reviewing court's analysis to what actually happened in the facts then under review. It is this "hypothetical effect of the knowledge of the existence of a potentially useful informant" which renders *Ippolito* applicable to the present case. The court in *Ippolito* further observed:

> Generally, the government must overcome the statutory presumption against granting a wiretap application by showing necessity. . . . Such a showing must allege specific circumstances that render normal investigative techniques particularly ineffective or the application must be denied. . . . The reason for requiring specificity is to prevent the government from making general

allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the particular investigation in which a wiretap is sought. The District of Columbia Circuit observed that "We must be careful not to permit the government merely to characterize a case as a 'drug conspiracy' . . . that is inherently difficult to investigate. The affidavit must show with specificity why in this particular investigation ordinary means of investigation will fail." *United States v. Ippolito*, 774 F.2d at 1486, *quoting United States v. Robinson*, 689 F.2d 448, 453 (D.C. Cir. 1983) (per curiam).

As to the sufficiency of the government's showing of good faith to use normal alternative means, the *Ippolito* court, noting in that particular case that "the government . . . tried certain alternatives but . . . failed to pursue others that easily suggest[ed] themselves [to be] potentially productive and not unduly dangerous," the court emphasized:

> Although the government need not pursue every alternative means of investigation, neither should it be able to ignore avenues of investigation that appear both fruitful and cost effective. It is not unreasonable to expect the government to utilize those methods that appear to be potentially productive. We would flout the statutory intent that wiretaps be used only if necessary, were we to sanction a wiretap simply because the government pursued some "normal" investigative strategies that were unproductive, when more more fruitful investigative methods were available. In effect, the government would be able to secure a wiretap in every case, even where a normal strategy would be likely to achieve the same result without resort to the

serious intrusion that a wiretap necessarily entails. *United States v. Ippolito*, 774 F.2d at 1486.

The chief defect in the Memorandum is the fact that, not only did it not consider *Ippolito's* teachings, holding, and supporting rationale, but the analysis failed to adequately account for the following factors which were either known to the government before the wiretap was sought or which were not presented to the judicial officer who authorized the wiretap. Specifically:

1) Resort to the use of highly intrusive electronic surveillance was unnecessary in light of the proven success of conventional investigative techniques;
2) The government was successful in obtaining substantial knowledge of the organization's personnel, structure, and activities;
3) The government was successful in establishing *direct dealings* with members of the Browning/McFadden organization;
4) The government was successful in establishing indirect dealings with members of the Browning/McFadden organization;
5) Conventional search and surveillance techniques were being used effectively before the wiretap application; and
6) The government was successful in establishing a network of informants, many of whom were willing to testify.

These factors lead to the inescapable conclusion that the affidavit offered in support of the wiretap demonstrated that the investigation was progressing at an acceptable pace. The government developed a network of informants and by combining both sources with other conventional search and surveillance techniques, the investigation made new breakthroughs in reaching the organization's hierarchy. In the recent

months preceding the application, the government made substantial progress in achieving the investigation's objectives. New sources of information with undeniable potential had been discovered and the fruits of the effective use of those sources assured further progress.

Petitioners attempted to make clear to the panel that the government's investigation was not one which had stalled and that it was not running out of steam. Rather, it was a vital investigation with viable possibilities for continued success. By failing to even reference *Ippolito*, the Memorandum achieved the result of affirming the denial of the suppression motions by *not* focusing on the following factors:

1) Consensual electronic surveillance was productive.
2) Resort to the use of highly intrusive wiretaps was unnecessary as other normal investigative techniques readily suggested themselves yet were not pursued by the government. For example, the affidavit indicated that Source #7 had previously shown the ability to interact with top ranking members of the organization. Source #7 was once trusted by the organization to the extent that he was allowed to deliver large sums of money—$80,000 on one occasion alone—and was privy to the location of some of the stash houses used for the storage of controlled substances. Moreover, Source #7, in an affidavit dated March 12, 1987, at ¶ 78, expressed his willingness "to assist in this investigation by making buys or any other type of assistance." None of the traditional means by which informants were used appeared in Special Agent Bareng's affidavit nor was there an adequate explanation of why they were not attempted.

3) The government underutilized Sources. Source #1—in addition to Source #7, as outlined above—was underutilized because Source #1 had previously provided accurate information, *was willing to wear a body transmitter*, and had introduced agents into the organization. Despite these facts, the affiant dismissed Source #1's utility to the investigation due to an inability to deal directly with McFadden and the Brownings.
4) Conventional search and surveillance techniques were underutilized.
5) Offers of immunity could have been used effectively.
6) There was no effort made to investigate the financial dealings of the McFadden/Browning organization through the use of conventional investigative techniques.

As was observed by the Court of Appeals for the Ninth Circuit in *United States v. Kalustian*:

> The government failed in this case to satisfy 18 U.S.C. § 2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete statement of underlying circumstances. *United States v. Kalustian*, 529 F.2d 585, 589 (9th Cir. 1976).

As to the issue of the material omissions and misrepresentations of fact in Special Agent Bareng's affidavit, the panel made light of significant facts which were underrated or not even seriously considered by the panel in the Memorandum in sharp contrast to the emphasis and pointed

questioning by the panel at oral argument on March 8, 1990. Specifically:

1) The affiant misled the issuing judge concerning Source #1's ability to uncover evidence of the conspiracy using only conventional techniques.
2) The affidavit omitted Source #1's prior cocaine sales to one Anthony Anderson.
3) The affiant also made material omissions and misrepresentations concerning Source #7's extensive background in the organization. There is no question that the government knew of Source #7's membership in the Browning/McFadden organization. For example, at the suppression hearing on May 19, 1988, Assistant United States Attorney Gordon's testimony established that Source #7 told law enforcement officials—including the affiant, Special Agent Bareng—of the informant's membership in the organization and his role as a delivery man of narcotics. Interestingly, though Special Agent Bareng's affiant stated that Source #7 worked directly with Elrader Browning, Jr., Source #7's testimony reflects that he *never* worked directly for Petitioner Browning; Source #7 actually worked under Edward McFadden. The affiant's failure to disclose this fact was undoubtedly material and certainly would have made the issuing judge question the necessity for the requested wiretap in light of the fact that there were no attempts to use Source #7's potential.
4) The affiant also admitted the fact that, at the time of the application, the government was making efforts to obtain the release of Source #7 from state custody. This was a key point at the March 8, 1990, oral argument. If it had been known that the government had a resource—not to mention an incarcerated resource—considered potentially useful and that the

government was taking steps to obtain the use of that resource, a reasonable judge would have denied the application or would have followed I*ppolito's* teaching to deny the application until proper criteria had been shown to the wiretap-issuing judge. *See United States v. Ippolito*, 774 F.2d at 1486. ("It is not unreasonable to expect the government to utilize those methods that appear to be potentially productive.") Had the true facts been demonstrated below at the time the wiretap application was sought and material omissions and misrepresentations were not present, no wiretap would have been approved. On review by the trial court, suppression was the only remedy based upon the challenged application.

5) The affiant also admitted the specific offers of assistance made by Source #7. Source #7 specifically offered to identify the Sources of the drugs and to discover how the organization was laundering its money. Part of the stated goals of the investigation was to identify sources of supply and how the organization invested its proceeds from narcotics sales. A showing that the government had a source who was willing to try to obtain that information would have been material to the analysis of whether traditional investigative techniques were capable of achieving the objectives of the investigation. Further, the testimony taken at the suppression hearings indicated that Source #7 offered to introduce agents into the organization.

6) Once the misstatements which were considered by the judge who authorized the wiretap were excised, and once the omissions which were unknown to the judge who authorized the wiretap were made known, the affidavit failed to establish the necessity required by Title 18 §

2518 and controlling case authority in order to justify the issuance of a wiretap.

Reviewing *Ippolito's* holding and supporting rationale and considering the impact of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2764 (1978), the result in the Memorandum seriously conflicts with the suppression of wiretap evidence upheld in *Ippolito*, a case which was not addressed, cited, or referenced in the Memorandum.

## CONCLUSION

The conflicts, incompatibility, and confusion caused by the Ninth Circuit Court of Appeals' Memorandum not suitable for publication are significant. To deny this request would be to deny Petitioners the benefit of applicable, well-reasoned law in the Ninth Circuit. Petitioners respectfully submit that this important issue warrants this Court's granting this Petition for Writ of Certiarori.

Respectfully submitted,

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MARCH 1991

# APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**FILED**
**AUG 6 1990**
**CATHY A. CATTERSON, CLERK**
**U.S. COURT OF APPEALS**

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|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- GREGORY WASHINGTON, Defendant-Appellant. | CA No. 88-5288 DC No. CR-87-0571-SW-11 |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- GEORGE CAMERON, Defendant-Appellant. | CA No. 88-5305 DC No. CR-87-0571-SW-2 |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- JAMES HOLIDAY, aka Harold J. Holiday, aka "DOC" Defendant-Appellant. | CA No. 88-5321 DC No. CR-87-0571-SW-9 |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- ELRADER BROWNING, JR., Defendant-Appellant. | CA No. 88-5322 DC No. CR-87-0571-SW-1 |
| | MEMORANDUM* |

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted March 8, 1990
Pasadena, California

BEFORE: GOODWIN, CHIEF JUDGE, CANBY AND LEAVY, CIRCUIT JUDGES.

Elrader Browning, George Cameron and Gregory Washington appeal from their convictions of multiple violations of federal law stemming from their involvement in a common drug trafficking operation. They claim that the district court erred by denying their motion to suppress evidence gathered by means of warrant–authorized wiretaps placed on defendants' telephones. Browning also claims that the sentence he received violates his constitutional rights. We affirm.

A. Admissibility of the Wiretap Evidence

The defendants raise two issues relating to the wiretap evidence: first, whether the judge who issued the warrant authorizing the wiretaps properly determined that the wiretap was necessary for the government's investigation; and second, whether the trial judge properly determined that there were no intentional or reckless omissions or misrepresentations in the wiretap application. We conclude that the former decision was not an abuse of discretion and that the latter decision was not clearly erroneous, and therefore uphold them. See United States v. Carneiro, 861 F.2d 1171, 1176 (9th Cir. 1988) (indicating standards of review).

1. The finding of necessity

Statutory law required the court to determine, before issuing the warrant, that "normal investigative procedures [had] been tried and [had] failed or reasonably appear[ed] to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). In light of the government's showing that it was encountering serious difficulty even after lengthy investigative efforts using more conventional means, the court acted well within its discretion in finding this condition satisfied.

The defendants point out that the affidavit in support of the warrant revealed that the government had already developed substantial knowledge of the Browning operation. The government does not dispute this; it emphasizes, however, that its knowledge, even though substantial, was deficient in at least two ways. First, there was no direct evidence about significant features of the enterprise. Several of the government's informants were unable to break into the organization's inner circle, where they could acquire direct evidence about the identity of suppliers, the distribution of profits and the role of Browning.[1] (Undercover DEA agents had failed to penetrate the operation beyond the retail level). Second, the possible sources of inside information did not represent good prospects for presenting proof at trial. At least three of the informants were

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1 The defendants claim that pursuing the undercover operation may well have led to direct contact with Browning because Browning had at least once agreed to meet an undercover agent. However, the scheduled meeting never took place because Browning did not show up; and the indications were that Browning had definitely decided not to meet the undercover agent. See Appellee's Excerpt of Record at 37, ¶ 97.

unwilling to testify. Another, who had previous drug convictions and would therefore have credibility problems as a witness, refused to wear a body wire that would have provided corroboration for his testimony.

The existence of these problems lent substantial support to the warrant application. See United States v. McCoy, 539 F.2d 1050, 1056 (5th Cir. 1976) (no evidence of full extent of illegal operation), cert. denied, 431 U.S. 919 (1977); United States v. Santora, 600 F.2d 1317, 1320 (9th Cir.) (Informant's unwillingness to testify), modified on other grounds, 609 F.2d 433 (9th Cir. 1979); United States v. Dennis, 786 F.2d 1029, 1036 (11th Cir. 1986) (refusal to carry recording device undetermined worth of potentially useful witness), cert. denied, 481 U.S. 1037 (1987).

The defendants also argue that the affidavit in support of the warrant did not demonstrate that other investigative techniques had been considered and rejected as reasonably unlikely to achieve the investigation's objective. More particularly, say the defendants, immunity, extended use of informants and financial inquiries were not mentioned. The affidavit did, however, contain a detailed discussion of four conventional investigative means that had been ruled out: grand jury, search warrants, interviews of suspects and trash searches. Appellee's Excerpts at 63, ¶¶ 166–73. Contrary to the defendant's statement, the discussion did include immunity. See id. at ¶ 167.

As to the use of informants, the affidavit amply explained why each of the seven could not provide the government with the evidence it needed. For example, Source #1, although perhaps ultimately able to make contact with Browning himself, as the defendants argue, was described in the affidavit as not having the ability to learn the identities of suppliers or customers. See Appellee's

Excerpt at 57, ¶ 110. Source #7 , who might have been able to acquire information about the full scope and inner workings of the operation, was likely to have serious credibility problems as a prosecution witness. See Appellee's Excerpt at 44, ¶ 75.[2]

The defendants do point out one investigative possibility that is indeed absent from the affidavit, tracing financial transactions. However, the government appears not to have had many leads as to the source and placement of the organization's funds. The only indication that the government had any information at all on this subject was in the suppression hearing testimony of Source #7, whose credibility at that time was suspect. In any case, nothing in particular was known at that time the affidavit was filed to suggest that tracing financial transactions was a viable investigative option.

2. Material omissions and misrepresentations.

In deciding the suppression motion, the district court was obligated to examine whether the application for the wiretap warrant contained any intentional or reckless omissions or misrepresentations. See United States v. Carneiro,

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2 The defendants argue emphatically that the government did not make as much use of the informants as it could have; they assert that, with time, these informants would have infiltrated the upper echelons of the organization. We concur with the issuing judge's assessment, however, that the government had spent sufficient time waiting for the informant plan to pay off (between a year and two years, depending on whether the pre-task force time is included).

861 F.2d at 1176.[3] In light of the evidence that both prosecution and defense presented the district court on this issue, we conclude that the court did not clearly err in finding no such infirmity.

The defendants assert that the affidavit filed in support of the warrant contained four specific material errors. First, according to defendants, the affidavit misrepresented Source #1's ability to meet with Browning by omitting the fact that his unsuccessful attempt at such a meeting was the only attempt he ever made. The record, however, shows that there was no misrepresentation; nothing at the time suggested that repeated efforts at meeting Browning would have been more fruitful. During two separate conversations with Source #1, both recorded, Browning declined to participate directly in proposed drug transactions; at one point, Browning explicitly referred Source #1 to an intermediary. These conversations tended to support the government's position that Source #1 would not be able to engage Browning personally in drug negotiations.[4]

Second, the defendants assert that the affidavit improperly failed to state that Source #1 had succeeded in selling cocaine to Anthony Anderson of the Browning organization. Evidence at the suppression hearing, however, failed to establish that such sales ever occurred, or that the government had knowledge of them if they did

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3 Had there been such inaccuracies, the court would have been required to determine whether, if the truth had been known, a reasonable judge could have denied the application for lack of a showing of necessity. See id.

4 The fact that post-affidavit meetings between Browning and Source #1 occurred, which defendants emphasize, does not seriously undermine the government's position that at the time of the affidavit Source #1 appeared unable to meet personally with Browning to discuss drug sales.

occur. The district court disbelieved the only two witnesses who testified to the sales. Given that one witness was a convicted perjurer, and the other (Anderson himself) filed his statement only after he was sentenced and incarcerated for his participation in the Browning ring, and that their statements were contradictory, the court's credibility judgment was far from clearly erroneous. Furthermore, the author of the warrant affidavit testified that he had never heard of Anderson until after the wiretap was in place, and that Source #1, when asked about Anderson, denied knowing him. This testimony tended to disprove the defendants' allegation of intentional omission.

Third, the defendants argue that the affidavit misrepresented Source #7's ability to meet the objectives of the investigation. The basis of this charge is Source #7's suppression hearing testimony concerning what he had told the government investigators prior to the wiretap application. However, the district court considered that testimony to lack credibility. Source #7's version of events conflicted sharply with that of the investigators, and with contemporaneous notes of meetings between Source #7 and government agents; in these circumstances, the district court's credibility judgment was proper.[5]

Finally, the defendants urge that the affidavit should have noted that Browning was in prison for

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5 On the strength of testimony by the author of the warrant affidavit, the district court found that Source #7 told the government he thought he could obtain information about the Browning ring's suppliers and financial activities. This fact did not appear in the affidavit, but the district court concluded that it had not been intentionally or recklessly omitted. The court so found because of its confidence in the credibility of the affidavit author. We do not consider that finding to have been clear error.

three years during which some of the murders with which he was linked took place; This fact, they say, would have undermined the claim that some of the informants had refused to testify out of fear of retaliation by Browning. Quite sensibly, the district court considered the omission immaterial because the affidavit did not state that Browning had personally committed the murders, only that he had ordered them.

B. Browning's Sentence

1. Mandatory sentence as ex post facto application

Browning contends that charging and sentencing him under the current versions of 21 U.S.C. § 848(b)(1)(B) constituted an ex post facto application of the law. His theory is that the current §§ 848(b) and 8 41(b)(1)(B) became effective in November 1987, that is, after the occurrence of the conduct for which he was convicted. Browning's understanding of the effective date of these statutes is incorrect.

The current versions of §§ 848(b) and 841(b)(1)(B) were parts of P.L. 99–570. Browning argues that the entire law became effective in November 1987. For this conclusion, he relies upon § 1004(b) of P.L. 99–570. That section, however, relates only to § 1004(a), which concerns special parole periods. It is clear that § 1004(b) is so limited because there are, in other parts of P.L. 99–570, similar "effective date" clauses appearing in individual sections. Obviously, these clauses relate only to the particular sections of P.L. 99–570 of which they are parts.

There being no special "effective date" clauses for the sections of P.L. 99–570 at issue here (i.e., those amending §§ 848(b) and 841(b)(1)(B)), they

became effective on the day on which the bill was signed by the President, namely, 24 October 1986. See United States v. Meyers, 847 F.2d 1408, 1414–16 (9th Cir. 1988). Since Browning's indictment covered acts committed between November 1986 and June 1987, the use of these sections in sentencing Browning was not an ex post facto application.

2. Life imprisonment without parole.

Browning argues that the sentence he received under § 848(b), life in prison without the possibility of parole, violated the fifth and eighth amendments to the United States Constitution. He does not argue that a sentence of life imprisonment without possibility of parole, as punishment for conducting a continuing criminal enterprise, is inherently unconstitutional. See United States v. Stewart, 820 F.2d 1107, 1108 (9th Cir.) (upholding such sentence), cert. denied, 484 U.S. 867 (1987); United States v. Valenzuela, 646 F.2d 352, 354 (9th Cir. 1980) (same). He claims, instead, that the mandatory nature of the penalty under § 848(b) deprived him of his right to individual punishment, and constituted cruel and unusual punishment. However, Browning may challenge the constitutionality of a statutory sentence only as it was applied in his particular case. United States v. Zavala-Serra, 853 F.2d 1512, 1517 (9th Cir. 1988). The record shows that the mandatory nature of § 848(b) was not determinative. At sentencing, the district court clearly indicated that it considered life imprisonment without parole to be the appropriate sentence, given the facts peculiar to Browning and his crime. Because the court would have imposed the same sentence even if it had not been required, the mandatory aspect of § 848(b) did not affect Browning's penalty. Thus, Browning lacks

standing to challenge the constitutionality of that provision's mandatory sentence. See Zavala-Serra, 853 F.2d at 1516–18 (denying standing to defendant who challenged sentencing statute because allegedly unconstitutional aspect of statute did not apply to defendant).

AFFIRMED.

# APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**JAN 16 1991**

**U.S. COURT OF APPEALS**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>-vs-<br>GREGORY WASHINGTON,<br>Defendant-Appellant. | CA No. 88-5288<br>DC No. CR-87-0571-SW-11 |
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>-vs-<br>GEORGE CAMERON,<br>Defendant-Appellant. | CA No. 88-5305<br>DC No. CR-87-0571-SW-2 |
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>-vs-<br>JAMES HOLIDAY, aka Harold J. Holiday, aka "DOC"<br>Defendant-Appellant. | CA No. 88-5321<br>DC No. CR-87-0571-SW-9 |
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>-vs-<br>ELRADER BROWNING, JR.,<br>Defendant-Appellant. | CA No. 88-5322<br>DC No. CR-87-0571-SW-1 |
| | ORDER |

BEFORE: GOODWIN, Chief Judge, CANBY AND LEAVY, CIRCUIT JUDGES.

The panel has voted unanimously to deny the petitions for rehearing and suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petitions for rehearing are hearby denied[1] and the suggestions for rehearing en banc are rejected.

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1 The motion of defendant Washington to join in the petitions of defendants Cameron and Browning is granted. So joined, the petition of Washington is denied along with the others.

# APPENDIX C

JUDGMENT

# United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED
SEP 12 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
SEP 19 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>GREGORY WASHINGTON,<br><br>Defendant-Appellant. | CA-88-5288<br>No.----------<br>DC #CR-87-0571<br>-SW-11 |

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered 8/6/90